STATE OF MICHIGAN

COURT OF APPEALS

DEBRA L. SABLOSKY,

Plaintiff-Appellant,

V

TRAIN STATION MOTEL, INC.,

Defendant-Appellee.

UNPUBLISHED
May 31, 2005

No. 260124
Huron Circuit Court
LC No. 04-002385-NO

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff commenced this action after she fell and injured herself while a guest at defendant's motel. Plaintiff alleges that she slipped and fell on a rock while walking to a bonfire area outside the motel. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), finding no basis for concluding that there was "a condition which involved an unreasonable risk of harm to anyone."

We review de novo a trial court's grant of summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Veenstra*, *supra* at 163.

> [A] trial court is required to consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Veenstra*, *supra* at 164.]

Submitted evidence may only be considered to the extent that it is substantively admissible for trial purposes. *Id.* at 163.

In general, a premises possessor owes a duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the [possessor] knows or should know the invitees will not discover, realize, or protect themselves

against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Liability can be premised on the possessor's active negligence in creating the condition or can be appropriate if the possessor knew or should have known about the condition. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). However, a possessor of land generally does not have a duty to protect invitees from an open and obvious danger, absent special aspects of the condition at issue. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004); *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).

Here, the parties disagree on the basis for the trial court's decision. Although the trial court's reasoning was brief, we reject defendant's claim that the trial court found that it did not have notice of the allegedly dangerous condition. To the contrary, the trial court ruled adversely to defendant on the issue of notice by determining, from the fact that the grass was mowed in the area where plaintiff fell, that defendant had notice about the condition of the land. Also, we reject plaintiff's narrow view of the trial court's decision as indicating that it found that the alleged rocks where plaintiff fell were not a hazard. The trial court took a broader view of the condition, appropriately considering that plaintiff fell in an open-field type of area. An invitee can expect less precautions for safety in a natural area, as compared for example to a pathway constructed by a possessor of land. See Restatement Torts, 2d, § 343, comment e, and *Larrea v Ozark Water Ski Thrill Show, Inc*, 562 SW2d 790, 793 (Mo App, 1978).

Regardless of any ambiguity in the trial court's decision, it is clear that the question whether the condition of the land created an unreasonable risk of harm could not properly be evaluated without considering the open and obvious doctrine. The open and obvious doctrine is integrally related to the landowner's duty. *Lugo, supra* at 517-518.

Viewed most favorably to plaintiff, the evidence submitted below supports defendant's claim that the danger and risk presented by the land was open and obvious. The test for an open and obvious danger asks whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A reasonable person in plaintiff's position would have foreseen that rocks could become embedded in the ground in the area where plaintiff fell. *Id.* at 238-239. Indeed, while plaintiff claimed that she did not see the rocks until after her fall, her deposition testimony, if believed, establishes that the embedded rocks were visible.

Also, the evidence did not create a genuine issue of material fact regarding whether there were special aspects of the open and obvious condition that distinguished it from typical open and obvious risks, so as to create an unreasonable risk of harm. See *Lugo, supra* at 517-519 (providing examples of "special aspects" that would create an unreasonable risk of harm); see also *Mann, supra* at 331-332. The danger that an invitee would slip and fall while walking through an open-field type area did not create an unreasonable, high risk of severe harm. Even assuming that it was reasonable for plaintiff to walk to the bonfire area at night, she could have effectively avoided the danger by taking a flashlight to illuminate the area where she walked.

Because the proofs did not create a question of fact regarding whether the risk of harm to plaintiff was unreasonable, the trial court appropriately granted summary disposition to defendant. *Lugo, supra* at 517-518; *Bertrand, supra* at 617.

Plaintiff makes a brief reference in her appellate brief to MCL 554.139, which deals with duties owed by lessors of residential properties. While we agree with plaintiff that the open and obvious doctrine cannot be applied to the statutory duties created by MCL 554.139, see *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003), plaintiff has misconstrued this Court's decision in *O'Donnell* as holding that hotel and guest relationships are subject to the covenants required for leases of "residential premises" in MCL 554.139. Rather, in *O'Donnell*, this Court remanded the case to the trial court, with instructions that the parties and trial court address that statutory issue, because it required further factual and legal development. *O'Donnell, supra* at 581-582.

In the instant case, we conclude that the statutory issue mentioned by plaintiff in her appellate brief involves a question of law and that all facts necessary to its resolution have been presented, thus obviating a need for remand. *Steward v Panek* 251 Mich App 546, 554; 652 NW2d 232 (2002). We conclude that plaintiff's assertion regarding MCL 554.139 – i.e., her assertion that it applies under the facts of this case – is contrary to the common, ordinary meaning of the words expressed in the statute.

The Legislature has plainly limited the statute to the lease or license of "residential premises." MCL 554.139. The word "residential" means "characterized by private residences." *Random House Webster's College Dictionary* (1997). The word "residence" means

> 1. the place, esp. the house, in which a person lives or resides; dwelling place; home. 2. the act or fact of residing. 3. the act of living or staying in a specified place, as while performing official duties. 4. the time during which a person resides in a place. . . . *Id.*

A residence

> is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It . . . has a permanence to it, and a continuity of presence, if you will, that makes it a residence. [*O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 345; 591 NW2d 216 (1999) (addressing the meaning of a restrictive covenant allowing use for "residential purposes only").]

Furthermore, the relationship between a hotel and a guest is not the same as that between a landlord and tenant and is subject to distinct statutory provisions. See *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 432-433; 581 NW2d 794 (1998). Accordingly, we conclude that defendant's premises, wherein plaintiff was a guest, did not constitute "residential premises" under MCL 554.139. The statute was inapplicable.

Our current disposition renders it unnecessary to address defendant's alternative arguments supporting the trial court's grant of summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter